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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re)
)
Amendment of Parts 21 and 74 of the)
Commission's Rules With Regard to) MM Docket No. 94-131
Filing Procedures in the Multipoint)
Distribution Service and in the) DOCKET FILE COPY ORIGINAL
Instructional Television Fixed Service)
)
and)
)
Implementation of Section 309(j) of the) PP Docket No. 93-253
Communications Act - Competitive Bidding)

To: The Commission

JOINT REPLY COMMENTS

ACS Enterprises, Inc., Baton Rouge Wireless Cable Television LLC, CableMaxx, Inc., MultiMedia Development Corp., Rapid Choice TV, Inc., Reading Wireless Cable General Partnership, Shreveport Wireless Cable Television Partnership, SuperChannels of Las Vegas, Inc., Wireless Holdings, Inc. and XYZ Microwave Systems, Inc. (together, the "Coalition of Wireless Cable Operators" or "Operators"), by their attorneys, hereby submit these Joint Reply Comments in response to the Commission's Notice of Proposed Rule Making ("Notice"), FCC 94-293, released December 1, 1994 in the above-captioned proceeding.¹

¹These Joint Reply Comments are filed on this day pursuant to Commission's Order Granting Extension of Time for Filing Comments and Reply Comments, DA 95-18, released January 6, 1995, by which the date for filing reply comments was extended to February 7, 1995.

Introduction

As the Operators stated in their Joint Comments ("Joint Comments") in this proceeding,² they strongly support the Commission's efforts to improve the processing of MDS applications. Central to this objective, the Operators demonstrated that, prior to lifting the present application filing freeze, it is imperative that the Commission revise its outdated 15-mile MDS protected service area rule in favor of a formula which more accurately reflects actual coverage patterns of wireless cable systems. In order to best implement this standard, the Operators showed that the rules must be modified before the current MDS filing freeze is lifted.

The Operators also illustrated how the MSA/RSA/ADI licensing proposal is incompatible with the existing interference landscape of wireless cable systems and their design limitations, and would frustrate the objectives of the competitive bidding process. Another alternative suggested by the Commission, licensing on the basis of sites predetermined by the Commission, would impair licensee flexibility and business judgment and impose additional burdens to Commission resources. The Operators showed that a far superior approach would be the adoption of a national filing window system, as such a system is perfectly suited to MDS and has been

²The Joint Comments were followed by a Supplement to Joint Comments, filed on January 24, 1995, adding Reading Wireless Cable General Partnership to the Coalition of Wireless Operators as a commenting party.

successfully implemented under similar circumstances in connection with the Low Power Television Service.

The Operators strongly support the Commission's proposal to limit the first filing window to established wireless cable operators, an important step that will allow existing operators to fill in their service areas and achieve the necessary channel capacity to reach a competitive "critical mass" in the most expeditious manner possible.

In supporting the Commission's tentative conclusions, the Operators further showed how coupling the national window filing system with a streamlined, short-form initial application, an electronic filing system, computer interference analysis technology now in use by the Commission and other procedural improvements, would substantially expedite initial application analysis, and greatly minimize burdens on Commission staff and resources.

The Operators also urged the Commission to adopt an open outcry auction format, along with substantial upfront auction payments and bidding preferences for small and minority- and women-owned entities to help ensure their participation. The Operators emphasized the importance that bidding preferences be premised upon the Commission reserving the first filing window for established operators so as not to frustrate the FCC's long-stated goal of improving the competitiveness of wireless cable systems.

In response to the comments submitted by others in this proceeding, the Operators offer the following.

I. THE COMMISSION MUST REDEFINE THE PROTECTED SERVICE AREA BEFORE IT LIFTS THE PRESENT APPLICATION FREEZE.

The Operators and other commenters in this proceeding have urged the Commission to take immediate action to amend Section 21.902 of the rules to redefine the protected service area of MDS stations,³ effective when or before the present "freeze" on the filing of applications is lifted because it is essential that existing service to the public not be disrupted.

The Operators disagree with the suggestion of American Telecasting, Inc. that the Commission revise its protected service area rule after the initial window reserved for existing operators.⁴ The substantial amount of service now being provided by wireless cable operators beyond their present 15-mile protected service areas (and future service in those areas now in the development stage) should not be subject to harmful interference -- not even from existing operators eligible to file in the "existing operators' preference" window. Permitting wireless cable operators to file for station facilities under the present, archaic rule could allow encroachment by such new facilities on the actual service areas of fellow existing operators. This would undermine

³The Operators, WCAI and other commenters urge the Commission to amend Section 21.902(d) of its rules by changing the formula for calculating the protected service area from a fixed radius to a function of equivalent isotropic radiated power ("EIRP") and height above average terrain ("HAAT"). See, e.g., Joint Comments at 3-5.

⁴Comments of American Telecasting, Inc. ("ATI") at pp. 20, 23.

what should be a basic objective of the Commission, the preservation and protection of the coverage areas of existing licensees and service to existing subscribers. For these reasons, the protected service area definition should be revised by the Commission before the filing freeze is lifted and any new applications are accepted.⁵

II. THE COMMISSION SHOULD ADOPT WCAI'S DEFINITION OF AN EXISTING OPERATOR FOR THE PROPOSED EXISTING OPERATOR FILING WINDOW.

The Operators, WCAI and other wireless cable operators commenting in this proceeding strongly support the Commission's proposal to limit filing in the first window to existing wireless cable operators. Although the commenters have advanced varying definitions of an "existing operator,"⁶ there is general consensus that the standard must be high enough to bar pretenders and

⁵Where two existing operators are closely spaced under the current rule, their "short-spacing" should be grandfathered under the redefined protection standard. Such is the case, for example, with FM broadcasting. Years ago, the Commission adopted FM rules providing for greater coverage areas after some stations in that service were already licensed. Preexisting stations were required to comply with the newer protection rules except to the extent their existing licensed facilities were short-spaced to another preexisting licensed facility. In such cases, they were permitted under the new rules to maintain such short-spacings in any future facilities modifications.

⁶See Joint Comments at 14-15; Comments of WCAI at 27-28; Comments of ATI at 14-17; Comments of Crowell & Moring, pp. 11-12; Comments of CAI Wireless Systems, Inc. pp. 2-4; Comments of Hardin and Associates, Inc., p.9; Comments of Heartland Wireless Communications, Inc., pp. 6-8; Comments of Sioux Valley Rural Television, Inc., pp. 3-4; Comments of United States Wireless Cable, Inc., pp. 4-7.

"greenmailers," but low enough to include legitimate operators that are striving for and are approaching the "critical mass" of channels necessary to be a competitive force in the market. In the interest of moving toward a consensus, the Operators now support a definition with an overall channel requirement equal to the standard suggested by WCAI,⁷ with certain exceptions. The Commission should require that an "existing operator" applicant certify that it has rights (through ownership or lease agreements) to four presently-authorized MDS and/or ITFS channels and, in addition, rights (through ownership or lease agreements) to at least sixteen additional MDS and/or ITFS channels which are presently-authorized, pending,⁸ or which are being sought in the existing operators' window. All twenty channels⁹ must be collocated

⁷Comments of WCAI at 27-28.

⁸"Pending" for the purposes of the rule should mean a pending new station application which has been accepted for filing or a modification application. Mutually exclusive applications may be included in the channel total, subject to the mutual exclusivity being favorably resolved at a later date. An application -- filed in the existing operators' window based in part upon already-pending applications which are mutually exclusive -- should not be granted or entered into auction until the prior mutually exclusive applications are granted or those mutual exclusivities are otherwise resolved.

⁹The Operators support this twenty-channel requirement in anticipation that, with the adoption today by the Commission of revised ITFS rules and application processing procedures, the ITFS filing freeze will be lifted and an ITFS filing window opened prior to opening of the MDS existing operators' window. This timing is essential, as the efforts of some wireless cable operators and their educational partners to develop ITFS service, and lease channel capacity for wireless cable, have been stymied by the ITFS freeze.

or subject to applications to collocate with the site specified in the new application.

However, the Operators disagree with WCAI that there should be a lesser standard for wireless cable operators in so-called "rural" areas. In general, operators in both urban and rural markets face competition from cable television systems with greater channel capacities than wireless cable. Moreover, the nationwide availability of direct broadcast satellite (DBS) services such as DirecTv, USSB, and PrimeStar, with their huge channel capacities and deep pockets, provide meaningful competition even in areas not served by cable television. Consequently, there is no overriding reason why "rural" operators require fewer wireless cable channels for viability and thus should be subject to a lower standard. A baseless distinction between urban and rural market wireless cable operators would needlessly complicate the rules and should not be adopted.

III. PRIOR TO AUCTION, MUTUALLY EXCLUSIVE APPLICANTS SHOULD BE PERMITTED TO AMEND THEIR PROPOSALS OR ENTER INTO INTERFERENCE AGREEMENTS TO RESOLVE MUTUAL EXCLUSIVITY.

Consistent with streamlining its MDS rules and procedures, the Commission should foster private resolution of mutual exclusivities between applications. Commission procedure should allow a mutually exclusive application to be amended, if the applicant chooses to do so, to eliminate the mutual exclusivity prior to the application being subject to auction. The Commission should also permit pre-

auction agreements between applicants to eliminate mutual exclusivity through coordination or acceptance of interference.

IV. FOR MDS AUCTIONS, THE COMMISSION SHOULD ADOPT THE "SMALL BUSINESS" DEFINITION IT USES FOR PCS.

As the Operators previously stated, they support the Commission's establishment of bidding preferences for MDS auctioning to promote the objective of ensuring participation by small businesses and minority- and women-owned businesses. Upon review of the filed comments, the Operators agree with WCAI and others that the Small Business Administration definition of a "small business"¹⁰ may be too restrictive and unduly exclude entities which truly are small businesses within the wireless cable industry. The Commission should adopt the definition of "small business" contained in its Personal Communications Service rules -- any business with average gross revenues of \$40 million or less for the three years proceeding the auction.¹¹ The Operators agree with WCAI¹² that this strikes an appropriate balance by including entities deserving of such designation while excluding those

¹⁰The Operators previously suggested that this definition of "small business," as set forth in Section 1.2110(b)(1) of the Commission's rules, might be appropriate for the MDS service. Joint Comments at 21 n.22. The Operators now believe this definition might be too restrictive for the capital-intensive MDS industry.

¹¹See Section 24.720 of the Commission's rules.

¹²Comments of WCAI at 62-63.

companies already possessing sufficient financial resources to construct and operate a system.

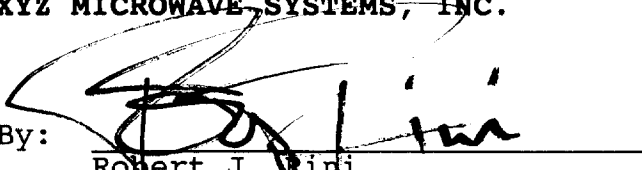
Conclusion

The Coalition of Wireless Cable Operators supports the Commission's further efforts to improve and expedite MDS processing and, as set forth in its Joint Comments and in these Joint Reply Comments, the Commission's proposals should be adopted.

Respectfully submitted,

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MULTIMEDIA DEVELOPMENT CORP.
RAPID CHOICE TV, INC.
READING WIRELESS CABLE GENERAL PARTNERSHIP
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